IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1595

COLONIAL PIPELINE COMPANY,

Appellant,

versus

JOSEPH N. TRAIGLE, COLLECTOR OF REVENUE,

Appellee.

On Appeal from the Supreme Court of the State of Louisiana

BRIEF FOR THE APPELLEE

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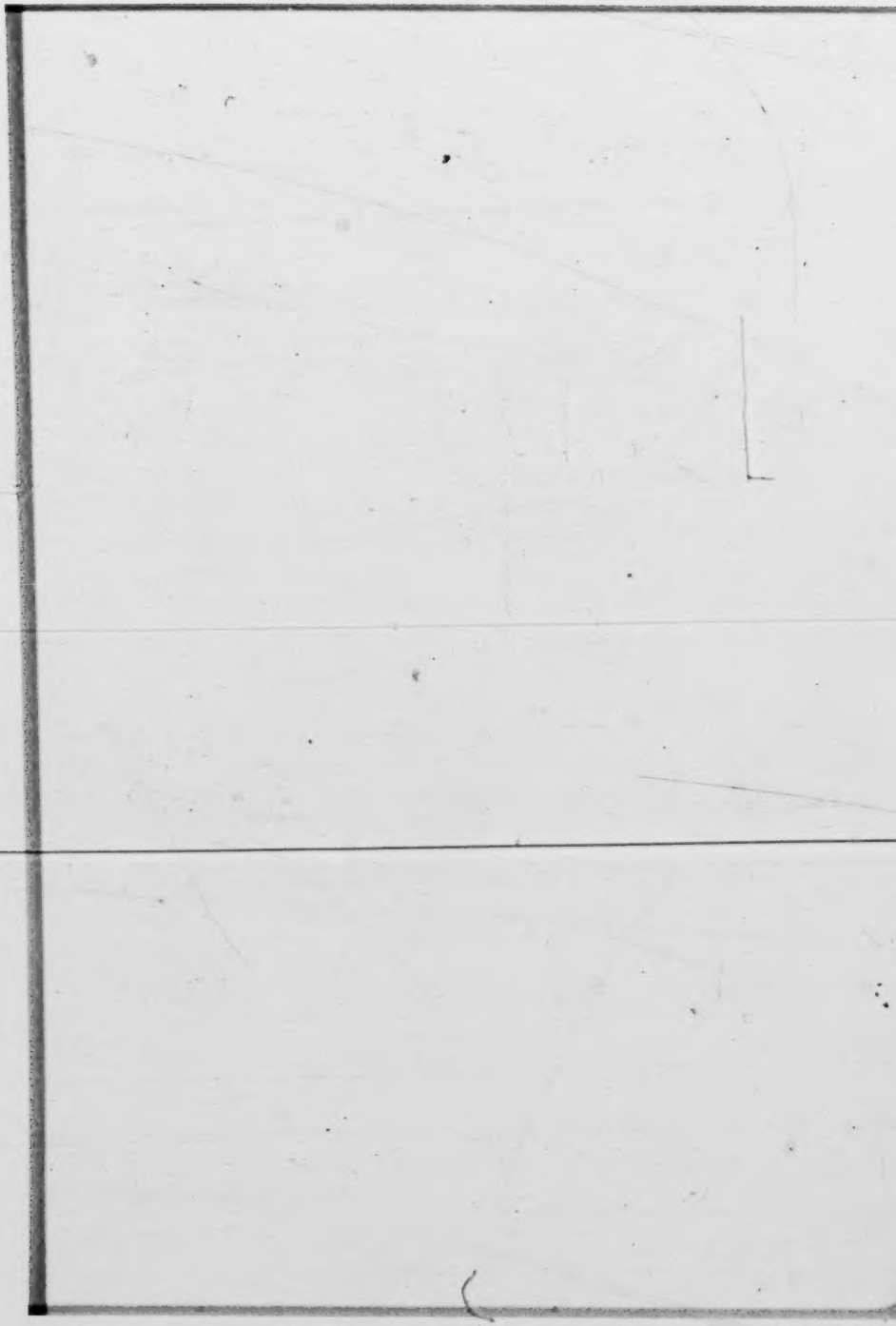
CITATIONS



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STATUTES INVOLVED

Acts 1914, No. 267 §23 and §24 (Now Sections 301, 302 and 315 of Title 12 of the Louisiana Revised Statutes [La. Rev. Stat.]); 12 La. Rev. Stat. §202 and §205 (Now 12 La. Rev.

Stat. §301, §302 and §315); 12 La. Rev. Stat. §301 and §302 H; 47 La. Rev. Stat. §601-§616, §1561-§1565, §1569-§1573, and §1576 are set out verbatim in the appendix attached hereto. 47 La. Rev. Stat. §401 and §1624 are set out verbatim in Appendix C of the Jurisdictional Statement.

QUESTION PRESENTED

1. Are the alternative local incidents provided in Louisiana Revised Statute 47:601, as amended by Act 325 of 1970, a sufficient basis to support a constitutional application of the Louisiana Corporation Franchise Tax upon Colonial Pipeline Company?

STATEMENT OF THE CASE

This suit arose from a dispute between the Collector of Revenue (hereinafter called Collector) and Colonial Pipeline Company (hereinafter called Colonial) concerning Colonial's 1970 and 1971 tax liability for the Louisiana Corporation Franchise Tax imposed by La. Rev. Stat. 47:601, as amended by Act 325 of 1970. (Set out verbatim in attached Appendix, p. 39-41) Pursuant to La. Rev. Stat. 47:1576 (Set out verbatim in attached Appendix, p. 65-66.) Colonial seeks refund of the taxes paid under protest.

Colonial, a foreign corporation, which voluntarily qualified to do business in Louisiana, owns and operates a petroleum pipeline system extending from Houston, Texas, through Louisiana to the New York City area. Of the total pipeline mileage owned by Colonial, approximately 258 miles are located in Louisiana. (Opinion: printed in Jurisdictional Statement, p. 26)

In addition, Colonial owns and operates pumping stations, tank farms and related facilities which are used to facilitate the interstate shipment of petroleum products through the pipeline. Colonial does not engage in any intrastate shipment of petroleum products in Louisiana; however, to maintain and operate the line and facilities, Colonial does employ approximately 25 to 30 persons in this state. (Opinion: printed in Jurisdictional Statement, p. 26)

The Collector contends that Colonial is liable for the Louisiana Corporation Franchise Tax and that the imposition of this tax upon Colonial is constitutionally permissible under the Commerce Clause, Article 1, Section 8, Clause 3, of the United States Constitution. Colonial, however, protests this imposition of the tax on the grounds that La. Rev. Stat. 47:601 as amended by Act 325 of 1970, was not intended by the Louisiana Legislature to impose a franchise tax on a corporation engaging exclusively in interstate commerce, and that if La. Rev. Stat. 47:601 does levy such a tax, then it violates the Commerce Clause of the United States Constitution.

In the case of *Colonial Pipeline Company v. Mouton*, 228 So.2d 718, writ refused 231 So.2d 393 (La. 1969), the Louisiana First Circuit Court of Appeal held that the Louisiana Corporation Franchise Tax, levied by La. Rev. Stat. 47:601 prior to its amendment by Act 325 of 1970 (Set out verbatim in Jurisdictional Statement in Appendix C, p. 51) was invalid as applied to Colonial. The court construed the pre-1970 statute to exact a tax for the privilege of engaging in business in Louisiana. Colonial was a foreign corporation doing only interstate business. Therefore, to impose the tax upon Colonial would be to exact a tax for the privilege of doing interstate business and thus, such application would violate the limita-

tions imposed by Article 1, Section 8 of the United States Constitution.

Subsequent to that decision, the Louisiana legislature amended La. Rev. Stat. 47:601 by Act 325 of 1970 and changed the operating incidence of the tax. (Opinion: printed in Jurisdictional Statement, p. 29) Disregarding the 1970 amendment, the trial court and court of appeal held that the statute in question still imposes a tax upon the privilege of doing business in the state and that since Colonial was a foreign corporation doing only interstate business in Louisiana, to impose the tax upon Colonial would be exacting a tax for the privilege of doing interstate business in violation of the Commerce Clause limitation. (A. p. 77-82; Opinion: printed in Jurisdictional Statement, p. 40-46)

The Supreme Court of Louisiana reversed the lower court's decision and held that the franchise tax is imposed upon local incidents and activities which are subject to the sovereign power of the State of Louisiana and therefore to apply the tax to Colonial would be a constitutional exercise of the State's taxing power. (Opinion: printed in Jurisdictional Statement, p. 38)

SUMMARY OF THE ARGUMENT

The constitutionality of the imposition of a state franchise upon a foreign corporation is determined by ascertaining whether or not the tax is imposed upon local incidents or activities that are subject to the sovereign power of the state.

The Supreme Court of Louisiana construed the statute in question to impose a tax upon local incidents which are sub-

ject to the sovereign power of the State and held that these incidents, under the controlling decisions of this Honorable Court, are a sufficient basis to support the constitutional application of the tax upon a foreign corporation which has voluntarily qualified to do business in the state, which is in fact exercising its charter within the state, and which owns and uses part of its capital, plant and property in the state in its corporate capacity.

The statutes as applied to Colonial taxes not the general privilege of doing interstate business but simply the corporation's privilege of enjoying in a corporate capacity the ownership or use of its capital, plant or other property in this state, the corporation's privilege of exercising and continuing its corporate charter in the State of Louisiana, and the corporation's use of its corporate form to do business in the State.

ARGUMENT

I

THE LOUISIANA SUPREME COURT'S CONSTRUCTION OF LA. REV. STAT. 47:601 IS BINDING UPON THIS HONORABLE COURT.

Since the initiation of this suit there has been a dispute between the parties as to exactly what is the basis or operating incidence of the franchise tax in question.

La. Rev. Stat. 47:601 provides:

"§ 601. Imposition of tax

"Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business

or actually doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than $10.00 per year in any case. **The tax levied herein is due and payable on any one or all of the following alternative incidents:**

"(1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term 'doing business' as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

"(2) The exercising of a corporation's charter or the continuance of its charter within this state.

"(3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity.

"It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. The tax

hereby imposed shall be in addition to all other taxes levied by any other statute.

"As used herein the term 'domestic corporation' shall mean and include all corporations, joint stock companies or associations, or other business organizations organized under the laws of this state which have privileges, powers, rights or immunities not possessed by individuals or partnerships. The term 'foreign corporation' shall mean and include all such business organizations as hereinbefore described in this paragraph which are organized under the laws of any other state, territory or district, or foreign country." (Emphasis ours) Amended by Acts 1970, No. 325, & 1, emerg. eff. July 13, 1970 at 2:15 P.M.

In the trial court, court of appeal, state Supreme Court and its briefs to this court, appellant has continuously argued that the above franchise tax is imposed solely upon "the privilege of doing interstate business as applied to appellant." However, the Louisiana Supreme Court considered and disagreed with Colonial's argument and held that the operating incidents of the tax was other than the mere "privilege of doing business" in the state. The Supreme Court construed the statue in the following manner:

"The Court of Appeal holding as it did in the earlier opinion that the statute (prior to the 1970 amendment) as applied to Colonial's activities within the State violated the commerce clause of the United States Constitution, rested the decision essentially upon its construction that the statute imposed a tax simply upon the privilege of doing business in the State of Louisiana. And, of course, State franchise or excise imposed on a corporation for the privilege of doing exclusively interstate business, as a general rule, are invalid.

"Colonial argues, and the Court of Appeal in the case presently before us held, that the 1970 amendment to R.S. 47:601 did not change the operating incidents of the franchise tax, that the statute before and after the amendment in this respect is essentially the same.

"We disagree. The amended statute omits the primary operating incident, i.e., 'the privilege of carrying on or doing business.' And, of course, it was the taxing of the privilege of carrying on or doing business which the Court of Appeal in its earlier decision held was the exclusive thrust of the statute. Additionally the amendment specifies three alternative incidents, one of which, 'the doing of business within this state in a corporate form,' was not clearly incorporated in the prior statute. (Jurisdictional Statement, p. 29-30)

• • •

"The statute as amended in 1970 imposes a corporation franchise tax upon, pertinently, every foreign corporation (and every domestic corporation as well) exercising its charter, authorized to do or doing business, or owning or using any part or all of its capital or plant, in the State of Louisiana. The tax is due and payable on any one or all of three alternative incidents:

"a) doing business in Louisiana in a corporate form

"b) the exercising of a corporation's charter or the continuance of its charter within the state and

"c) the owning or using any part or all of its capital, plant or other property in Louisiana in a corporate capacity.

"The thrust of the statute is to tax not the interstate business done in Louisiana by a foreign corporation, but

the doing of business in Louisiana in a corporate form, including

> " 'each and every act, power, right, privilege or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations . . .'

(Jurisdictional Statement, p. 30-31).

• • •

"Louisiana's corporation franchise tax statute, as amended by Act 325 of 1970, and as applied to foreign corporations doing only interstate business in Louisiana, taxes not the general privilege of doing interstate business but simply the corporation's privilege of enjoying in a corporate capacity the ownership or use of its capital, plant or other property in this state, the corporation's privilege of exercising and continuing its corporate charter in the State of Louisiana, and the corporation's use of its corporate form to do business in the State.

"The corporation, including the foreign corporation doing only interstate business in Louisiana, enjoys under our laws many privileges separate and apart from simply doing business, such for instance as the legal status to sue and be sued in the Courts of our State, continuity of business without interruption by death or dissolution, transfer of property interests by the disposition of shares of stock, advantages of business controlled and managed by corporate directors, and the general absence of individual liability, among others.

"That the corporation enjoys power and privileges not possessed by individuals or partnerships was long ago recognized by this Court. *Conway v. Lane Cotton Mills*

Co., 178 La. 626, 152 So. 312 (1933)." Jurisdictional Statement, p. 37-38).

Thus, the Supreme Court of Louisiana expressly held as a matter of state law that the statute in question imposes the franchise tax upon the above enumerated alternative operating incidents and not, as appellant contends, upon the "privilege of doing interstate business" in the state.

It is respectfully submitted that the well settled principle of constitutional law, that the construction of state law by the highest state court is binding upon this Honorable Court, is applicable in this case. The arguments and issues were clearly presented to the Supreme Court of Louisiana and the court's holding was express and unambiguous in its construction of the statute in question. See *Memphis Natural Gas Company v. Stone*, 335 U. S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948); *Ersenstadt v. Baird*, 405 U. S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972); *Groppi v. Wisconsin*, 400 U. S. 505, 91 S.Ct. 490, 27 L.Ed. 2d 1971).

ARGUMENT

II

THE ALTERNATIVE LOCAL INCIDENTS PROVIDED IN LA. REV. STAT. 47:601, AS AMENDED BY ACT 325 OF 1970, ARE A SUFFICIENT BASIS TO SUPPORT A CONSTITUTIONAL APPLICATION OF THE LOUISIANA CORPORATION FRANCHISE TAX UPON COLONIAL.

This court has long recognized that a nondiscriminating, properly apportioned corporate franchise tax may be imposed upon foreign corporations when the tax is imposed upon local

incidents that provide a taxable nexus with the state. All that is constitutionally required is that the state impose the tax upon some incident which is subject to the sovereign power of the state. *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948); *General Motors Corp. v. Washington*, 377 U. S. 436, 84 S.Ct. 1564, 12 L.Ed. 2d 430 (1964).

In the *Spector* case *supra*, this Honorable Court held that the State of Connecticut could not impose a franchise tax solely for the privilege of doing interstate business. However, as noted in that case and subsequent cases, this prohibition does not preclude state taxation of other aspects of the interstate business. In the *Spector* case, *supra*, this Court stated at 95 L.Ed. 573, 578:

> "The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. **The incidence of the tax provides the answer.** The courts of Connecticut have held that the tax before us attaches **solely** to the franchise of petitioner to do interstate business. **The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State.** Those taxes may be imposed although their payment may come out of funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and non-discriminatory." (Emphasis added)

In *General Motors Corp.* case, *supra*, this Honorable Court stated at 377 U. S. 436, 447, 12 L.Ed. 2d 430, 438:

"It is beyond dispute, we said in *Northwestern States Portland Cement Co. v. Minnesota, supra*, 358 U. S. at 458, 3 L.Ed. 2d at 427, 'that a State may not lay a tax on the "privilege" of engaging in interstate commerce.' But that is not this case. **To so contend here is to overlook a long line of cases of this Court holding that an instate activity may be a sufficient local incident upon which a tax may be based.** As was said in *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 609, 95 L.Ed. 573, 578, 71 S.Ct. 508 (1951), **'the state is not precluded from imposing taxes upon other activities or aspects of this (interstate) business**, which, unlike the privilege of doing interstate business, are subject to the sovereign power of the state.' This is exactly what Washington seeks to do here * * *." (Emphasis added)

In *Memphis Natural Gas Company v. Stone*, 335 U. S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948), the facts are almost identical to the case at bar. The gas company piped gas across the State of Mississippi. **It did no intrastate business in that State.** It had no office in that state and no employees other than those necessary to maintain the pipeline. **The company was not qualified to do business in Mississippi.** The Mississippi tax statute in question was a franchise or excise tax very similar to our Louisiana statute. The pertinent part of the Mississippi statute stated:

"* * * It being the purpose of this section to require the payment to the State of Mississippi, this tax for the right granted by the laws of state to exist as such organization, and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence."

The Supreme Court of Mississippi concluded the statute

did not attempt to tax interstate commerce. The Court, at 29 So.2d 268; 270; said:

> "It is to be seen that **there is no attempt to tax interstate commerce as such, but that levy is an exaction which the state requires as a recompense for the protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization *** here the local activities in maintaining, keeping in repair and otherwise in manning the facilities of the system throughout the one hundred thirty-five miles of its lines in this State.**" (Emphasis added)

In affirming the Supreme Court of Mississippi, this Court said at 335 U. S. 80, 96; 92 L.Ed. 1832, 1844.

> "We think that the State is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its border. **Of course, the interstate commerce cannot be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce.** This is a tax on activities from which the State, not the United States gives protection and the State is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business." (Emphasis added)

Since the state may not exact a tax for the privilege of doing interstate business but yet it can constitutionally tax other aspects and activities of this business, the crucial issue becomes one of deciding where to draw the line that establishes the boundary between the permissible area of state taxation and the prohibiting limitation of the Commerce

Clause. As stated in the *Spector* case, *supra*, **"The incidence of the tax provides the answer."** Accord, *General Motors Corp. v. Washington*, 377 U. S. 436, 12 L.Ed. 2d 430, 84 C.St. 1564 (1964).

The question is one of deciding if the operating incidence of the tax is on some local incident which is reasonably related to the powers of the state and is nondiscriminatory. But what will provide a local incident? This Court answered this in *General Motors Corp. v. Washington, supra*, wherein it stated at 377 U. S. 436, 441, 12 L.Ed. 2d 430, 435:

> "* * * *. As was said in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444, 85 L.Ed. 267, 270, 61 S.Ct. 246, 130 ALR 1229 (1940), "the simple but controlling question is **whether the state has given anything for which it can ask return."** (Emphasis added)

As shown in our prior argument, the Supreme Court of Louisiana held that the operating incidents of the franchise tax in question are the alternative incidents provided in La. Rev. Stat. 47:601. The trial court found as a matter of fact that Colonial is subject to the tax on the basis of all three incidents. Colonial has voluntarily qualified with the Secretary of State to do business in Louisiana in the corporate form, it is in fact doing business in this state in the corporate form, and it owns and is using part of its capital and property in Louisiana in the corporate capacity. (A. 79-80)

Are these incidents a sufficient basis to support a constitutional application of this franchise tax upon Colonial? Has the State of Louisiana given anything for which it can ask

return? The Supreme Court of Louisiana held the State has given something for which it can ask return. The Court stated:

> "The fact that the corporate form of doing business is inextricably interwoven in a foreign corporation's doing interstate business in the State, does not in our view detract from the fact that the local incident taxed is for the form of doing business rather than the business done by that corporation. And it is our view that the local incident is real and sufficiently distinguishable, so that taxation thereof does not, under the controlling decisions of the United States Supreme Court, violate the Commerce Clause.
>
> "The statute does not discriminate between foreign and local corporations, being applicable, as it is, to both. Nor do we believe that the State's exercise of its power by this taxing statute is out of proportion to Colonial's activities within the state and their consequent enjoyment of the opportunities and protection which the state has afforded them.
>
> "Furthermore we believe that the State has given something for which it can ask return. The return, tax levy in this case, is an exaction which the State of Louisiana requires as a recompense for its protection of lawful activities carried on in this state by Colonial, activities which are incidental to the powers and privileges possessed by it by the nature of its organization, here, as in *Memphis Natural Gas*, the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of their pipeline system throughout the 258 miles of its pipeline in the State of Louisiana." (Opinion: printed in Jurisdictional Statement, p. 38)

This Honorable Court and several of the other highest state courts have considered almost identical questions and in

every case, the courts have held that the imposition of a franchise tax upon such local incidents is a constitutionally valid application of the state's taxing power.

In *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948), the franchise tax was imposed upon the corporate existence in Mississippi and the local incidents that were seized upon to sustain the application of the tax upon the foreign corporation doing only interstate business in the state was the "maintaining, keeping in repair, and otherwise in manning the facilities used in the interstate commerce" even though those activities were necessary to conduct the interstate commerce.

In *Texas Gas Transmission Corp. v. Atkins*, 197 Tenn. 123, 270 S.W. 2d 384 (1954); certiorari denied, 348 U. S. 883, 75 S.Ct. 125, 99 L.Ed. 694, the court considered the specific arguments presented in the instant case. Texas Gas, a Delaware corporation, was an interstate pipeline carrier which had qualified to do business in Tennessee. However, **the Court found that Texas Gas engaged in exclusively interstate business in Tennessee.** The legal question involved was whether the excise taxes were validly levied and collected. Texas Gas argued that the *Spector* case, *supra*, was controlling and that the taxes were therefore not valid. The Tennessee Supreme Court in rejecting this argument stated at 270 S.W. 2d 384, 386:

> "It is our conclusion that the crux of the Spector case is that the Supreme Court accepted as its basic predicate the construction placed upon the statute involved by the highest court of Connecticut, which held that the tax was levied upon the right to **do interstate business. The right to do business in the corporate form was not**

involved in the case . . . The Tennessee franchise tax, however, is imposed upon the privilege of engaging in business in corporate form in this State." (Emphasis ours)

In *Mid-Valley Pipeline Co. v. King*, 221 Tenn. 724, 431 S.W.2d 277 (1968), appeal dismissed, 393 U.S. 321, 89 S.Ct. 556, 21 L.Ed. 2d 517 (1969), the Tennessee Court, in its opinion, stated at 431 S.W.2d 277, 280:

"The franchise and excise taxes are upon **the privilege of engaging in business in corporate form in Tennessee, and not merely on the doing of business.** *Texas Gas Transmission Corporation v. Atkins*, 197 Tenn. 123, 270 S.W. 2d 384 (1954), certiorari denied 343 U.S. 883, 75 S.Ct. 125, 99 L.Ed. 694; *Texas Gas Transmission Corporation v. Atkins*, 205 Tenn. 495, 327 S.W. 2d 305 (1959).

"Foreign corporations, doing business in this State without domesticating or qualifying to do business in Tennessee, shall, as a recompense for the protection of their local activities and as compensation for the benefits they receive from doing business in Tennessee, pay franchise and excise taxes. T.C.A. Sections 67-2701 and 67-2902; *Texas Gas Transmission Corporation v. Atkins*, 205 Tenn. 495, 327 S.W. 2d 305, supra.

The fact complainant is and has been solely engaged in interstate commerce within this State is not determinative. *Texas Gas Transmission Corporation v. Atkins*, 205 Tenn. 495, 327 S.W. 2d 305, supra."

And at Page 282 stated:

"The record in the instant case clearly shows complainant has and is employing or owning capital or property in this State and exercising its corporate franchise

within the State. It maintains its right-of-way and other valuable properties located in this State **in its corporate capacity.** It has and is using our courts to vindicate its rights.

"Such local activities, although incidental to the conduct of interstate commerce, are taxable under the foregoing authorities." (Emphasis ours)

In *Great Lakes Pipeline Co. v. Oklahoma Tax Commission*, 231 P.2d 655 (Okla. 1951), the Oklahoma Supreme Court held that a license levied upon a foreign corporation for the privilege of existing and exercising its corporate functions in that state was valid, since the purpose of the statute in question was to tax the foreign corporation for the privilege of existing in the corporate form and exercising its corporate functions in Oklahoma.

In *Roadway Express, Inc. v. Director, Division of Tax*, 50 N.J. 471, 236 A.2d 577 (1967), appeal dismissed, 390 U.S. 745, 88 S.Ct. 1443, 20 L.Ed. 2d 276(1968), the Court upheld a state franchise tax, although Roadway was **doing exclusively interstate** business in New Jersey. In upholding the tax, the Supreme Court of New Jersey analyzed the decision in the case of *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), in the light of the later decisions of the United States Supreme Court in *Railway Express Agency v. Virginia*, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed. 2d 450 (1959); *Northwestern State Portland Cement Company v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed. 2d 421, (1959); and in *General Motors Corporation v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed. 2d 430 (1964), and then said:

"It remains established that a tax on an exclusively interstate business verbally based solely on the privilege of doing such business in the State is constitutionally forbidden. We therefore construe that basis of New Jersey's tax to be inapplicable to taxpayers like those involved here. Since a tax may not exclude such corporation from doing such business within it, it may not exact an impost on the thesis of a condition of entry therein. More technically speaking, it is our view that the New Jersey tax is validly applicable to these taxpayers on the foundation of other basis expressed in the statute. The first is that the tax is expressly in lieu of 'all other state, county or local taxation upon or measured by intangible personal property' of a foreign corporation, which kind of a tax we conceive could be validly imposed on a corporate entity of another state conducting an exclusively interstate business here. **We believe the tax is additionally sustainable as a levy 'for the privilege of *** employing or owning capital or property, or maintaining an office, in this State,' if not also 'for the privilege of * * * exercising its corporate franchise' here. We think such privileges are sufficiently different from that of 'doing interstate business so that they are, in the sense stated in Spector, aspects of such business subject to the sovereign power of the state."** (Emphasis added)

In *Southern National Gas Corp. v. Alabama*, 301 U.S. 148, 57 S.Ct. 695, 81 L.Ed. 970 (1937) this Honorable Court stated at 81 L.Ed. 970, 974:

"The statute, which is challenged as here applied, was under consideration in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 77 L.Ed 719, 53 S.Ct. 373. In the light of the decisions of the Supreme Court of the State, this Court concluded that the tax was laid 'not upon the authorization, right or privilege to do business in Alabama, but upon the actual doing of business.' Id. p.

223. The tax was held invalid as applied to a foreign corporation whose sole business in the State consisted in the landing, storage and sale in the original packages, of goods imported from abroad. In the instant case the Supreme Court of the State has reviewed its rulings and has expounded the meaning of the statute. **The state court holds that the tax is a franchise tax levied 'on foreign corporations as a prerogative to the right to exercise of its corporate functions in the State.' It 'is not on any basis a tax on business' but is laid 'on the exercise of corporate functions, or on the privilege of exercising corporate functions within the State and its employment of its capital in Alabama.'**

"By compliance with the statute appellant obtained the privilege of engaging within the State in any of the activities which its charter authorized." (Emphasis added)

It can be seen from the above quoted language that the Court approved the new construction of the Alabama statute and held that a state could impose the tax for the "privilege of doing an intrastate business and not only on the actual doing of such business.

In *Stone v. Interstate Natural Gas Co.*, 103 F.2d 544 (5th cir. 1939), affirmed per curiam 308 U.S. 522, 60 S.Ct. 292, 84 L.Ed. 442 (1940), the Court had the same Mississippi statute before it that was later considered in *Memphis Natural Gas Co. v. Stone, supra.* The taxpayer was an interstate gas pipeline company which engaged solely in the transportation of gas in interstate commerce. **It engaged in no intrastate business, but had qualified under the state law** and the state sought to impose a franchise tax on it. The Court in the course of its opinion stated at 103 F.2d 544, 548:

"* * *. The Act of 1934 does not confine itself to corporation but (Sect. 1) extends to associations, joint stock companies and 'every form of organization for pecuniary gain, having capital stock represented by shares, * * * **having privileges not possessed by individuals or partnerships.**' * * * ('"Doing business" * * * shall mean and include each and every act, power or privilege exercised or enjoyed in this state, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization.') There is imposed (Sect. 2) an annual 'franchise tax or excise tax' upon each such organization existing in this State or hereafter organized under its laws. The same tax (Sect. 3) is then imposed on every such organization organized and existing by virtue of the laws of some other State or country 'now, or hereafter doing business within this state, as hereinbefore defined.' As to each class of organizations the tax is $1 per thousand dollars of 'capital used, invested or employed * * * within this state,' and it is explained that the tax is required in the case of domestic organizations 'for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws * * * the powers, rights, privileges,' etc., Section 2, and in the case of foreign organizations for 'the benefit and protection of the government and laws of the state' received by the capital which measures the tax. Section 3. Payment of the tax is made a condition precedent to the continued existence of domestic organizations and 'to the right to continue business in this state, if not organized under the laws of Mississippi.'

"* * *

"* * *. In order to treat the foreign organization in as nearly the same manner as possible, the tax is applied to it so soon as it 'does business' in the State. Under the common and natural meaning of these words a commer-

cial activity would be understood, but the Legislature assigns a very artificial meaning to them, which includes not only any and every corporate act, **but the exercise or enjoyment in the State of any power or privilege acquired by virtue of being so organized. The privilege and power of a corporation to sue and be sued, or even to acquire and hold property as such are included. When this Gas Company, though it did not domesticate, filed its charter and appointed its agent for service in order to qualify for doing business in the old sense, it began the enjoyment in Mississippi of a privilege incident to its corporate organization, it began to 'do business' in the new and artificial sense.** (Emphasis added)

"* * *

"* * *, a foreign corporation formed for profit is doing business in Mississippi and is taxable as soon as it gets ready to be active by having property there and enjoying the protection of the State for it, and qualifies formally by filing its charter and naming its agent for process service. These latter acts clearly mark its appearance in the State. Thus both foreign and domestic corporations, though intending to do and actually doing no active business in the common sense except what is foreign or interstate commerce, are taxed, but are not taxed because they carry on such commerce."

"* * *

And at 103 Fed.2d 544, 549:

"* * *. **The charter which the Gas Company filed and obtained the right to enjoy in Mississippi grants to it power to do much more than to engage in the interstate transportation of gas and oil.** The Gas Company could also have mined, bored for and refined gas, oil and other

minerals in Mississippi, and transported and sold them within the State. It could have acquired, held and sold stock in other corporations there, voting the stock and controlling the corporations, and could have acquired, held and sold real estate and personal property of every description, all by the express terms of its charter. **This franchise or privilege tax is not escaped because the Gas Company chose only to transport and sell gas interstate. It owes no more tax because it did that.** Therefore that activity is not taxed." (Emphasis added)

The Court then went on to conclude that the tax was valid and could be imposed on the corporation.

In *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948), this Honorable Court considered the legal significance of imposing a franchise tax on the incidence of qualifying to do intrastate business. The Court, at 335 U.S. 80, 92; 92 L.Ed. 1832, 1842, stated:

"On the other hand, in *Interstate Natural Gas Co. v. Stone*, 308 U.S. 522, 84 L.Ed. 442, 60 S.Ct. 292, we affirmed per curiam a judgment of the Fifth Circuit in *Stone v. Interstate Natural Gas Co.*, 103 F.2d 544, on the authority of *Southern Natural Gas Corp. v. Alabama*, supra. (301 U.S. at 153, 156, 157, 81 L.Ed. 974-967, 57 S.Ct. 696). The tax in question in the 308 U.S. case was exacted by the same Mississippi statute employed here. This differs from the Mississippi statute in the Interstate case in 284 U.S. The Interstate Case in 308 U.S. differed from this present case, so far as is material, only in the fact that the foreign corporation filed a copy of its charter as a prerequisite to doing business in Mississippi and **appointed an agent for the service of process. The page references in the Stone citation of the Southern Gas Case show that this Court considered the Mississippi tax in**

the Stone case as one not on business but 'on the privilege of exercising corporate functions within the State and its employment of its capital in (Mississippi).' Southern Gas Corp. v. Alabama, supra (301, U.S. 153, 81 L.Ed. 974, 57 S.Ct. 696). **In the Southern Gas Case, p. 155, the company did intrastate business but in the Stone Case, no intrastate business was done. Thus the local event of qualifying for intrastate business, which occurred in both Southern Gas and Stone, brought a different result from that in the Ozark Case and in Interstate, 284 U.S., where the privilege or right to do interstate business was protected."** (Emphasis added)

Further support for this position is found in *Wisconsin & Michigan Steamship Company v. Corporation and Securities Commission*, 371 Mich. 61, 123 N.W. 2d 258 (1963), writs denied, 375 U.S. 912, 84 S.Ct. 668 (1964), 11 L.Ed. 2d 610. Petition for rehearing denied 376 U.S. 966, 84 S.Ct. 1123 (1964), 11 L.Ed.2d 984, wherein the Michigan Supreme Court held that the appellant Steamship company, **a foreign corporation which engaged solely in interstate commerce in Michigan, but which had voluntarily qualified to do intrastate business in Michigan, was liable for the state's franchise tax irrespective of whether the corporation actually exercises the privilege or not.** The court stated at 123 N.W.2d 258, 261:

"It is not the privilege to do interstate business in Michigan for which appellant applied to the State and for the grant of which the State seeks to charge it an annual fee. Its right to engage in such interstate business in Michigan is not subject to the State's grant or denial. **Appellant sought, and was granted the privilege to do intrastate business in Michigan. Whether or not appellant actually exercised its corporate franchises in Michigan in**

the conduct of intrastate business, it was granted the privilege to do so, upon its own application, and, so, must pay." (Emphasis added)

It is agreed that the Commerce Clause precludes the states from requiring that foreign corporations procure a certificate of authority and pay excise or license taxes as a condition precedent to doing interstate business in that state and the State of Louisiana does not attempt to do so. However, in its brief to this Court, Appellant repeatedly asserts that the Louisiana Corporation Franchise Tax is a license tax, the payment of which is a condition precedent to doing interstate commerce in Louisiana. It should be noted that Colonial cites no Louisiana law or jurisprudence in support of these contentions. A mere reading of the Louisiana Corporation Franchise Tax Law (La. Rev. Stat. 47:601-616) (Set out verbatim in attached Appendix, p. 39-59) and the Louisiana Foreign Corporation Law (La. Rev. Stat. 12:301-302) (Set out in attached Appendix, p. 33-34) clearly shows that there are no such requirements or provisions to support Colonial's statements and the Louisiana court decisions are explicit on this point.

La. Rev. Stat. 12:301 requires that foreign corporations obtain a certificate of authority from the Secretary of State before it shall have the right to transact local business in Louisiana. The following section, La. Rev. Stat. 12:302 H specifically exempts corporations transacting business in interstate or foreign commerce from this requirement. Taken together, these statutes clearly show that a certificate of authority is only necessary if the foreign corporation desires to transact intrastate business. If the corporation carries on only interstate business in Louisiana, the certificate of

authority is not required. Although these statutes were enacted subsequent to Colonial's qualification in 1962, the Louisiana law in 1962 was to the same effect. La. Rev. Stat. 12:202 (Set out verbatim in attached Appendix, p. 34-36) required foreign corporations to qualify with the Secretary of State as a condition precedent of being authorized to do local business in the state. However, La. Rev. Stat.. 12:205 (Set out verbatim in attached Appendix, p. 37-39) specifically excluded foreign corporations engaging exclusively in foreign or interstate commerce from enforcement of the qualification requirement. The source provision for this statute, Acts 1914, No. 267, Section 24 (Set out verbatim in attached Appendix, p. 39) expressly provides the same exemptions.

The Louisiana courts have long recognized this exemption from the state qualification requirements. In *Graham Mfg. Co. v. Rolland*, 191 La. 757, 186 So. 93 (1939), the Supreme Court of Louisiana invoked this exception provision and held that the State could not require that a foreign corporation engaging exclusively in interstate commerce obtain a certificate of authority from the Secretary of State as a condition precedent to doing business in the state. The Court at 186 So. 93, 94, stated: "This proviso would go without saying." Accord, *State v. American Railway Express Co.*, 159 La. 1001, 106 So. 544 (1925).

We respectfully submit that these statutes and cases affirmatively show that Louisiana does not impose a license or franchise tax as a condition precedent to doing interstate business in this state nor does the state attempt to do so. Colonial voluntarily qualified under the provision of La. Rev. Stat. 12:202 (Jurisdictional Statement, p. 26) to do business in Louisiana and when it did Colonial became authorized to exercise the same powers, rights, and privileges accorded

similar domestic corporations. (Opinion: printed in Jurisdictional Statement, p. 26)

La. Rev. Stat. 47:601 expressly provides that the purpose of the tax is to require payment to the State of Louisiana by domestic corporations for the right granted by the laws of the state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of the state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. State law grants these privileges to domestic corporations. Due to this, the State can exact a corporation franchise tax, because the state has given benefits for which it can seek compensation. Likewise, it is state law which grants these same powers, rights, privileges and immunities to foreign corporations which choose to qualify to do business in the state in corporate form or which choose to exercise its charter within the state or which choose to own or use part or all of its capital, plant or other property in the state in the corporate capacity. Just as with domestic corporations, the state is giving benefits for which it can ask a return and the extent of use of these privileges is immaterial.

In Part III of its brief to this Court, Appellant asserts that the collection procedures for the franchise tax in question authorize a complete cessation of the interstate business which makes the tax equivalent of a state license to engage in interstate commerce.

In support of this last mentioned contention, Colonial states at page 22 of its brief: "Section 401 of the Louisiana law provides that failure to pay the tax authorizes the Collector to rule the taxpayer into court to show cause why he should not be ordered to cease 'further pursuit of the business

taxed.' " (La. Rev. Stat. 47:401 is set out in Jurisdictional Statement, p. 51)

In making the above quoted statement, the Appellant has made a grossly misleading statement of the law. La. Rev. Stat. 47:401 is a part of Chapter 3 of Sub-Title II of Title 47 of the Louisiana Revised Statutes and Chapter 3 (La. Rev. Stat. 47:341-405) deals exclusively with the Louisiana Occupational License Tax, and has nothing whatsoever to do with the Louisiana Corporation Franchise Tax. By its own terms, La. Rev. Stat. 47:401 applies only to "the tax levied by this chapter," that is, the Louisiana Occupational License Tax.

Colonial next contends that if it had not paid the franchise tax, it could have been found guilty of a felony pursuant to La. Rev. Stat. 47:1641. (La. Rev. Stat. 47:1641 is set out in the Jurisdictional Statement, p. 60) Appellee submits that the express provisions of La. Rev. Stat. 47:1641 clearly show that the statute does not apply to a taxpayer such as Colonial. **The statute only applies to an agent of the state who collects a tax from a taxpayer and then fails to remit or account for such money to the state.** In the case of *State v. Leon S. Poirier*, No. 87,832; 87,833; 87,838, the 19th Judicial District Court of Louisiana explicitly held that the statute only applies to an agent of the state (Opinion in attached Appendix, p. 67-69). In that case, the court sustained a motion to quash the charges against the defendant on the grounds that he was not an agent of the state for the collection of the taxes involved therein. The Supreme Court of Louisiana expressly affirmed this ruling in denying the state's application for writs. The Court, at 260 La. 452, 256 So.2d 440 (1972), and 260 La. 600, 256 So.2d 640 (1972), held that the ruling of the district court was correct. (Opinion in attached Appendix, p. 70-71)

Colonial next contends that had it not paid the franchise tax in question, the state, pursuant to La. Rev. Stat. 47:1570-1573 (Set out verbatim in attached Appendix, p. 63-65), could within 15 days have sold at public auction enough of Colonial's interstate facilities to pay the tax. Appellee submits that this assertion is totally without foundation in law or fact. Pursuant to La. Rev. Stat. 47:1569 (Set out in attached Appendix, p. 63), the Collector can use the procedure of distraint only after the tax has been finally assessed as provided in La. Rev. Stat. 1561-1565. (Attached Appendix, p. 59-63) These provisions provide the taxpayer with the right to appeal the assessment to the courts by either paying the tax under protest and filing suit for refund in a court of law, as was done in the present case (See La. Rev. Stat. 47:1576 in attached Appendix, p. 65-66), or by first appealing to the Louisiana Board of Tax Appeals without payment and then proceeding to a court of law.

Contrary to the Appellant's assertions, the foregoing statutes, and cases construing them, clearly show that the Louisiana Corporation Franchise Tax and the Louisiana tax collection procedures are in no way similar to the ordinance involved in *Ideal Cement Co. v. United Gas Pipe Line*, 282 F.2d 574 (5th Cir. 1960), cert. denied, 369 U.S. 837, 82 S.Ct. 863, 7 L.Ed.2d 842 (1962), or to the state tax invoived in *Crutcher v. Kentucky*, 141 U.S. 47, 11 S.Ct. 851, 35 L.Ed. 649 (1891).

In fact, Appellant's contentions completely ignore the Louisiana Supreme Court's holding in this case that the franchise tax at issue is imposed solely upon the alternative incidents provided in La. Rev. Stat. 47:601. Additionally, Appellant's erroneous assertions concerning the applicability and

use of the Louisiana tax collection provisions merely confuses the sole and only issue before this Honorable Court.

As we previously stated, the only question presented to this Court is whether or not the incidents provided in La. Rev. Stat. 47:601 are a sufficient basis to support a constitutional application of the franchise tax upon Colonial. The Supreme Court of Louisiana held that the incidents are a sufficient basis and we respectfully submit that the prior decisions of this Court clearly show that the Louisiana Supreme Court decision is correct and should be affirmed.

CONCLUSION

It is submitted that the imposition of the Louisiana Corporation Franchise Tax upon Colonial Pipeline Company is a constitutional application of the tax.

Wherefore Appellee respectfully urges and prays that this Court affirm the judgment of the Supreme Court of Louisiana and grant Appellee judgment against Colonial in the amount of $69,894.78.

Respectfully submitted,

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and Whit M. Cook, II
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Attorneys for Appellee

PROOF OF SERVICE

The undersigned, attorney for Joseph N. Traigle, successor in office to E. Lee Agerton, Collector of Revenue, defendant-appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the ____ day of August, 1974, I served a copy of the foregoing brief on Colonial Pipeline Company, plaintiff-appellant herein, by mailing a copy of the same in an addressed envelope with postage prepaid to its counsel of record, R. Gordon Kean, Jr., of Sanders, Miller, Downing & Kean, Post Office Box 1588, Baton Rouge, Louisiana 70821.

Baton Rouge, Louisiana, this ____ day of August, 1974.

CHAPMAN L. SANFORD and
WHIT M. COOK, II

APPENDIX

The following sections of Title 12 of the Louisiana Revised Statutes are involved in this case:

§ 301. Conditions precedent to transacting business

No foreign corporation, except one which has before January 1, 1969 been granted a certificate of authority to do business in this state which is still valid, shall have the right to transact business in this state until it shall have procured a certificate of authority to do so from the Secretary of State. No foreign corporation shall be entitled to procure such a certificate of authority to transact in this state any business which a corporation organized under Chapter 1 or 2 of this Title is not permitted to transact. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized, governing its organization and internal affairs, differ from the laws of this state.

Acts 1968, No. 105, § 1.

§ 302. Acts not considered transacting business

Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purpose of being required to procure a certificate of authority pursuant to R.S. 12:301, by reason of carrying on in this state any one or more of the following activities:

A. Maintaining or defending any action or suit, or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

B. Holding meetings of its directors or shareholders, or carrying on other activities concerning its internal affairs.

C. Maintaining bank accounts.

D. Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

E. Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, if such orders require acceptance outside this state before becoming binding contracts.

F. Creating evidence of debt, mortgages or liens.

G. Securing or collecting debts or enforcing any rights in property securing the same.

H. Transacting any business in interstate or foreign commerce.

* * *

The following sections of former Title 12 of the Louisiana Revised Statutes were effective at the time Colonial qualified to do business in Louisiana and are involved in this case:

§ 202. Documents to be filed with Secretary of State; agent for service of process; limited certificate of authority

A. As a condition precedent to being authorized to do business in this state; every corporation, except corporations engaged in the business of insurance in all its forms, shall file with the Secretary of State the following documents:

1. A written declaration stating its domicile, the place in the state where it intends to do or is doing business, the

intended place or the actual place of its principal business establishment in this state and outside of this state, and the name and address (including street and number, if any) of its agent in this state upon whom process may be served.

2. A written power of attorney appointing the agent upon whom process may be served. Such agent may be an individual who is a resident of this state, or a corporation authorized to transact business in this state and authorized by its charter to act as the agent of a corporation for service of process. Before any corporation may be appointed the agent upon whom process may be served, it shall file with the Secretary of State a certificate setting forth the names of at least two individuals at its address as set forth in the declaration filed pursuant to paragraph 1 of this Subsection, each of whom is authorized to receive any process served on it as such agent, and the corporation may by filing an amended certificate substitute or add the names of other individuals.

3. A certified copy of a resolution of the board of directors of the foreign corporation. This resolution, which shall accompany the power of attorney required by paragraph 2 of this Subsection shall agree that any lawful process against the corporation which is served upon the agent shall be a valid service upon the corporation. This authority shall continue in force and be maintained as long as any liability growing out of or connected with the business done by the corporation in this state remains outstanding against the corporation.

4. A certified copy of its articles of incorporation, together with a certified copy of its certificate of incorporation. Subsequent modification of the articles or certificate of incorporation shall be filed as provided herein. Until filed, they shall be ineffective in this state. As amended Acts 1950, No. 316, § 2; Acts 1954, No. 25, § 1.

B. If the corporation intends to engage or is engaged in

a business in this state which will subject it to liability for state severance taxes, the corporation shall file, in addition to the documents required in Sub-section A, a written declaration of the place in this state where the severance accounts will be maintained.

C. Copies of documents on file with the Secretary of State, certified by him shall be prima facie evidence of due incorporation and of authority to do business in this state.

D. In the event that a foreign corporation desiring to qualify to do business within the State of Louisiana shall not desire to exercise all of the powers granted to it under its existing charter, or in the event under the laws of the State of Louisiana said foreign corporation shall be forbidden or prevented from exercising some of the powers granted to it under its existing charter, or in the event such corporation shall be prevented for any reason from exercising the principal or primary business within the State of Louisiana for which it is organized within the state of its incorporation, but shall desire to exercise some but not all of the powers granted to it under its existing charter, then and in any such event such corporation desiring so to qualify within the State of Louisiana for limited purposes shall append to the written declaration required in Sub-section A, paragraph 1 of this Section, a certified copy of a resolution of its board of directors, trustees, or other governing body, setting forth briefly the nature of the business it intends to undertake within the State of Louisiana or the corporate powers to be exercised within the State of Louisiana, and upon the filing of such certified resolutions, together with the other documents required by this Section, the Secretary of State shall append to or inscribe upon the face of the certificate of authority to do business provided in R.S. 12:203, a statement setting forth the type or kind of business which said foreign corporation is authorized to pursue in this state, or the powers of said corporation's charter which may be exercised within this state, and upon the issuance of such limited certifi-

cate of authority to do business, said corporation shall be fully authorized and empowered to carry on such limited business or to exercise such limited powers as are set forth in said certificate and no more, provided, however, that limited qualification under the terms of this Subsection shall not limit or reduce the tax liability, if any, of such corporation so qualifying; and, provided further that any corporation so qualifying for limited purposes shall not be entitled to exemptions from taxation granted to banks, homesteads, insurance companies, or nontrading corporations, or other corporations granted specific exemptions under the laws of Louisiana; and, provided further that in the event that the corporation so qualifying for limited purposes is a banking corporation under the laws of the state of its incorporation and desires to exercise some, but not all of the powers granted under its existing charter, then and in such event, the said banking corporation shall deliver to the Secretary of State at the time of filing the other documents required by this Section an additional copy of the resolution of its board of directors, trustees, or other governing body, as provided in this Subsection, and the Secretary of State shall thereupon mail or deliver to the State Banking Department said additional copy of said resolution. If within five days from such mailing or delivery to the State Banking Department said department objects in writing to the issuance of the certificate of qualification requested, the Secretary of State shall not issue said certificate. Added Acts 1950, No. 349, § 1.

§ 205. Penalty for failure to comply with law; civil action to recover fine; exceptions

A. Any corporation, or the agent of any corporation, other than a corporation engaged exclusively in foreign or interstate commerce, which establishes an office or appoints a resident agent in this state without complying with R.S. 12:202(A), (1)-(3) inclusive, shall be guilty of a misdemeanor.

B. Suit may be instituted against the corporation or the agent or both for a violation of Sub-section A. On behalf of the state, the district attorney may institute this suit in any court of competent jurisdiction in any parish where the law is violated.

C. Upon conviction of a violation of Sub-section A, the corporation or the agent or both shall be fined not less than twenty-five nor more than five hundred dollars. If the agent fails to pay the fine, he may be imprisoned for not less than three days nor more than four months.

The following sections of Acts 1914, No. 267 of the Louisiana Legislature are the source provisions for 12 La. Rev. Stat. &202 and &205 cited above:

Section 23. Be it further enacted, etc., That any corporation formed in any State, Territory or Federal district or possession of the United States, or any foreign country, shall be entitled to a certificate from the Secretary of State, authorizing it to exercise the same powers, rights and privileges as are accorded to similar domestic corporations organized under this act, upon filing in the office of the Secretary of State a certified copy of its certificate of incorporation and of its articles of incorporation; provided, however, that no certificate shall be granted to any foreign corporation having the same name or one so nearly resembling it as to be likely to deceive as that of any corporation already authorized to do business within this State. A foreign corporation so circumstanced may, however, add to its name some term which would distinguish it from the corporation already registered, and thereupon be permitted to register and engage in business.

Certified copies of any subsequent modification of the articles of incorporation or certificate of due incorporation, shall be filed in the same manner as hereinafter provided, and until so filed shall not be effective in this State. Copies of

the documents on file with the Secretary of State, certified to by him, shall be prima facie evidence of due incorporation and of authority to do business in this State.

Section 24. Be it further enacted, etc., That any foreign corporation, or the agent of any foreign corporation, that shall establish any office or appoint a resident agent within the limits of this State, without having complied with the provisions of this act, contained in the preceding section as well as the provisions of existing laws relative to the designation of domicile and of any agent or agents for service of process, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than five hundred dollars for each offense, which sum may be recovered in a civil action against the agent or corporation or both, to be instituted by the District Attorney for and in behalf of the State, in any court of competent jurisdiction in any parish where the law is violated, and the agent failing to pay the fine may be imprisoned not less than three days nor more than four months; provided that nothing in this section or in this act contained shall apply to any foreign corporation engaged only in interstate or foreign commerce.

The following sections of Title 47 of the Louisiana Revised Statutes are involved in this case:

§ 601. Imposition of tax

Every domestic corporation and every corporation, exercising its charter, or qualified to do business or actually doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided

profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than $10.00 per year in any case. The tax levied herein is due and payable on any one or all of the following alternative incidents:

(1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

(2) The exercising of a corporation's charter or the continuance of its charter within this state.

(3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity.

It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. The tax hereby imposed shall be in addition to all other taxes levied by any other statute.

As used herein the term "domestic corporation" shall mean and include all corporations, joint stock companies or associations, or other business organizations organized under the laws of this state which have privileges, powers, rights or immunities not possessed by individuals or partnerships. The term "foreign corporation" shall mean and include all such business organizations as hereinbefore described in this

paragraph which are organized under the laws of any other state, territory or district, or foreign country.

Amended by Acts 1970, No. 325, § 1, emerg. eff. July 13, 1970 at 2:15 P.M.

§ 602. Determination of taxable capital

A. Taxable capital. Every corporation taxed under this chapter shall determine the amount of its issued and outstanding capital stock, surplus, undivided profits and borrowed capital as the basis for computing the franchise tax levied under this chapter and determining the extent of the use of its franchise in this state.

B. Holding corporation deduction. Any corporation having as a subsidiary a banking corporation as defined below shall be entitled to deduct from its capital stock, surplus, undivided profits and borrowed capital, as defined in this chapter, its investments in and advances to such subsidiary banking corporation to the extent that such investments and advances exceed the difference between the total assets and the capital stock, surplus, undivided profits and borrowed capital of the holding corporation. "Subsidiary banking corporation" is defined to be a banking corporation organized under the laws of the United States of America or of the state of Louisiana the capital stock of which to an extent of at least eighty percent is owned by a holding corporation.

C. Public utility holding corporation deductions. Any corporation registered under the Public Utility Holding Company Act of 1935 having subsidiary corporations as defined hereinbelow, shall be entitled to deduct from the amount of its Louisiana taxable capital the amount of its investments in and advances to subsidiary corporations allocated to Louisiana under R.S. 47:606B in computing its franchise tax. "Subsidiary corporation" is defined to be a corporation in which at least

eighty percent of the voting power of all classes of its stock (not including nonvoting stock which is limited and preferred as to dividends) is owned by a registered public utility holding corporation.

§ 603. Borrowed capital

As used in this Chapter, "borrowed capital" means all indebtedness of a corporation, subject to the provisions of this Chapter, maturing more than one year from the date incurred, or which is not paid within one year from the date incurred regardless of maturity date. As to any indebtedness which is extended, renewed, or re-financed, the date such indebtedness was originally incurred or contracted shall be considered for the purpose of this definition the date incurred or contracted. With respect to amounts owed by a taxpayer corporation to an affiliate, all real and actual indebtedness, regardless of age, and which in fact represent capital substantially used to finance or carry on the taxpayer's business, shall be borrowed capital. An "affiliated corporation" is any corporation which through stock ownership, directorate control, or other means, substantially influences policy of some other corporation or is influenced through the same channels by some other corporation.

The following indebtedness shall be excluded:

(1) Federal, state and local tax accruals or taxes due and not delinquent more than thirty days.

(2) Advances, credits or sums of money voluntarily left on deposit with the taxpayer, or for credit account by customers or other persons with merchants, agents, brokers or factors, to facilitate the transaction of business between such parties, and by such taxpayer segregated and not otherwise used in the conduct of its business.

(3) When deposited with a trustee or other custodian or

when segregated into a separate or special account, an amount equivalent to the principal amount of cash or securities actually and in good faith set aside, for the payment of principal or interest on funded indebtedness or other fixed obligations, whether at the date of such segregation matured or maturing within ninety days thereafter or within whatever period such segregation is fixed by prior written commitment, or by court order for the liquidation of such obligation; or for the payment of dividends theretofore lawfully and formally authorized.

(4) After the approval or allowance by the court of a petition for receivership, bankruptcy or reorganization of a corporation under the bankruptcy law, there shall be deducted from borrowed capital that part of the indebtedness of the corporation which could reasonably be paid by cash and temporary investments on hand and not reasonably currently needed for working capital, if such receivership, bankruptcy or reorganization was not pending; and an equivalent amount will be allowed as an offset against cash and temporary investments on hand.

§ 604. Capital stock

For the purpose of ascertaining the tax imposed in this Chapter, capital stock, whether having par value or not, shall be deemed to have such value as is reflected on the books of the corporation, subject to examination and revision by the collector, but in no event shall such value be less than is shown on the books of the taxpaying corporation.

Where capital stock is issued for assets and the transaction is treated as a tax free exchange under R.S. 47:131, 132, 133, 135, 136, 137 and 138, the collector shall consider the cost of the assets as determined under R.S. 47:605A and the value of any intangibles acquired as the value of the stock issued to acquire such assets. Capital stock shall include full

shares, fractional shares, and any script certificates convertible into shares of stock.

§ 605. Surplus and undivided profits

A. Determination of value. For the purpose of ascertaining the tax imposed in this Chapter, surplus and undivided profits shall be deemed to have such value as is reflected on the books of the corporation, subject to examination and revision by the collector from the information contained in the report filed by the corporation as hereinafter provided and from any other information obtained by the collector; but in no event shall such revision reflect the value of any asset in excess of the cost thereof to the taxpayer at the time of acquisition; in the case of an acquisition which qualifies as a tax free exchange under R.S. 47:131, 132, 133, 135, 136, 137, and 138, cost to the taxpayer at the time of acquisition shall be deemed to be the basis of such property determined under R.S. 47:146, 148, and 152; provided that in no event shall such value be less than is shown on the books of the taxpaying corporation.

In computing surplus and undivided profits there shall be excluded such surplus as may be required by court order to be set aside and segregated in such manner as not to be available for distribution to stockholders or for investment in properties, the earnings from which are distributable to stockholders; provided further that in computing surplus and undivided profits there shall be included all reserves other than those for definitely fixed liabilities, reasonable depreciation (including in reasonable depreciation, at taxpayer's election, amortization of a war, defense or other emergency facility taken by and allowable to a taxpayer for income tax purposes under R.S. 47:65, provided such amortization is recorded on the books of the taxpayer), bad debts and established valuation reserves, such reserves in all cases to be made under rules and regulations to be prescribed by the collector. When,

because of regulations of a governmental agency controlling the books of a taxpayer, the taxpayer is unable to record in its books the full amount of depreciation sustained, the taxpayer may apply to the collector of revenue for permission to add to its reserve for depreciation and deduct from its surplus the amount of depreciation sustained but not recorded, and if the collector finds that the amount proposed to be so added represents a reasonable allowance for actual depreciation, he shall grant such permission. The collector also shall allow inclusion in depreciation reserves (but shall not limit the reserve thereto, if otherwise reasonable) depreciation taken by and allowable to a taxpayer under R.S. 47:65 provided such depreciation is recorded on the books of the taxpayer.

B. Treatment of deficit. If the accounts titled surplus and undivided profits reflect a negative figure or deficit, such deficit shall be deductible from capital stock and borrowed capital for the purpose of computing the tax.

§ 606. Allocation of taxable capital

A. General allocation formula.

For the purpose of ascertaining the tax imposed in this Chapter, every corporation subject to the tax is deemed to have employed in this state the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of the following ratios:

(1) The ratio that the net sales made to customers in the regular course of business and other revenue attributable to Louisiana bears to the total net sales made to customers in the regular course of business and other revenue. For the purposes of this Sub-section net sales and other revenues attributable to Louisiana shall be determined as follows:

(a) Sales attributable to this state shall be all sales where the goods, merchandise or property is received in this state by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. However, direct delivery into this state by the taxpayer to a person or firm designated by a purchaser from within or without the state shall constitute delivery to the purchaser in this state. Revenue derived from a sale of property not made in the regular course of business shall not be considered.

(b) Revenues attributable to this state derived from air transportation shall include all gross receipts derived from passenger journeys and cargo shipments originating in Louisiana.

(c) Revenues attributable to this state derived from transportation of crude petroleum, natural gas, petroleum products or other commodities for others through pipelines shall include all gross revenue derived from operations entirely within this state plus a portion of any revenue from operations partly within and partly without this state, based upon the ratio of the number of units of transportation service performed in Louisiana in connection with such revenue to the total of such units. A unit of transportation service shall be the transporting of any designated quantity of crude petroleum, natural gas, petroleum products or other commodities for any designated distance.

(d) Revenues attributable to this state derived from transportation other than aircraft or pipeline shall include all such income that is derived entirely from sources within this state, and a portion of revenue from transportation partly without and partly within this state, to be prorated subject

to rules, and regulations of the collector, which shall give due consideration to the proportion of service performed in Louisiana.

(e) Revenues from services other than those described above shall be attributed within and without Louisiana on the basis of the location at which the services are rendered.

(f) Rents and royalties from immovable or corporeal movable property, shall be attributed to the state where such property is located at the time the revenue is derived.

(g) Interest on customers' notes and accounts shall be attributed to the state in which such customers are located.

(h) Other interest and dividends shall be attributed to the state in which the securities or credits producing such revenue have their situs, which shall be at the business situs of such securities or credits, if they have been so used in connection with the taxpayer's business as to acquire a business situs, or, in the absence of such a business situs shall be at the commercial domicile of the corporation.

(i) Royalties or similar revenue from the use of patents, trade marks, copyrights, secret processes and other similar intangible rights shall be attributed to the state or states in which such rights are used.

(j) Revenues from a parent or subsidiary corporation shall be allocated as provided in Sub-section B of this Section.

(k) All other revenues shall be attributed within and without this state on the basis of such ratio or ratios, prescribed by the collector, as may be reasonably applicable to the type of revenues and business involved.

(2) The ratio that the value of all of the taxpayer's property and assets situated or used in Louisiana bears to the

value of all of its property and assets wherever situated or used. In determining value, depreciation and depletion reserves must be deducted from the book values of the properties in question. The various classes of property and assets shown below shall be allocated within and without Louisiana on the bases indicated:

(a) Cash shall be allocated to the state in which located.

(b) Cash in banks and temporary cash investments shall be allocated to the state in which they have their business situs, or in the absence of a business situs, to the state in which is located the commercial domicile of the taxpayer.

(c) Trade accounts and trade notes receivable shall be allocated by reference to the transactions from which the receivables arose, on the basis of the location at which delivery was made in the case of sale of merchandise or the location at which the services were performed in case of charges for services rendered.

(d) Investments in and advances to a parent or subsidiary shall be allocated as provided in Sub-section B of this Section.

(e) Notes and accounts other than those notes and accounts described under items (b) and (d) above shall be allocated to the state in which they have their business situs, or in the absence of a business situs, to the state in which is located the commercial domicile of the taxpayer.

(f) Stocks and bonds not included in (b) or (d) above shall be allocated to the state in which they have their business situs or in absence of a business situs to the state in which is located the commercial domicile of the taxpayer.

(g) Immovable and corporeal movable property shall be allocated within and without Louisiana on the basis of

actual location. Corporeal movable property of a class which is not normally located within a particular state the entire taxable year shall be allocated within and without Louisiana by use of a ratio or ratios which shall give due consideration to the usage within and without this state. Mineral leases and royalty interests shall be allocated to the state in which the property covered by the lease or royalty interest is located.

(h) All other assets shall be allocated within or without Louisiana on the basis, prescribed by the collector, as may reasonably be applicable to the assets and the type of business involved.

B. Allocation of intercompany items. For the purpose of allocation, investments in, advances to, or revenues from a parent or subsidiary corporation shall be allocated to Louisiana on the basis of the percentage of capital employed in Louisiana for corporation franchise tax purposes by the parent or subsidiary corporation. A subsidiary corporation is any corporation the majority of the capital stock of which is actually, wholly or substantially owned by another corporation and whose management, business policies and operations are, howsoever, actually, wholly or substantially controlled by another corporation; which latter corporation shall be termed the parent corporation.

C. Minimum allocation; assessed value of real and personal property. The portion of capital stock, surplus, undivided profits and borrowed capital allocated for franchise taxation under this Chapter shall in no case be less than the total assessed value of real and personal property in this state of each such domestic or foreign corporation for the calendar year preceding that in which the tax is due.

§ 607. Railroad corporations

A. Incorporated in more than one state. Any railroad

corporation incorporated under and by virtue of the laws of more than one state, shall compute its tax in the same manner as a foreign corporation.

B. Domestic railroad corporations with foreign subsidiaries. Any railroad corporation organized only under the laws of Louisiana and which, in whole or in part, operates, does business or owns property and assets outside of the state, either directly, or indirectly through one or more foreign subsidiary corporations, the capital stock, and funded debt of which to the extent of at least eighty percentum (80%) each is owned by the railroad corporation organized only under the laws of Louisiana, shall compute its tax as follows:

For the purpose of such computation the total of the property and assets of the corporation organized only under the laws of Louisiana, both within and without the state, shall include the property and assets of its foreign subsidiary or subsidiaries; the total volume of business done by the corporation, both within and without the state, shall include the volume of business done by its foreign subsidiary or subsidiaries; there shall be included in the report of the corporation a comparative consolidated balance sheet of the corporation and its foreign subsidiary or subsidaries, as of the beginning and close of its last calendar year or fiscal year; and the entire issued and outstanding capital stock, surplus and undivided profits of the corporation shall be deemed to be the entire issued and outstanding capital stock, surplus and undivided profits, determined as herein provided, of the corporation and its foreign subsidiary or subsidaries on the basis of their consolidated accounts.

§ 608. Exemptions

The provisions of this Chapter do not apply to corporations organized for the following purposes:

(1) Labor, agricultural, or horticultural corporations;

(2) Mutual savings banks, national banking corporations and banking corporations organized under the laws of the state of Louisiana who pay a tax for their shareholders or whose shareholders pay a tax on their shares of stock under other laws of this state, and building and loan associations;

(3) Fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, or other benefits to members of such society, order or association or their dependents;

(4) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(5) Corporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation;

(6) Business leagues, chambers of commerce, real estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(7) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation;

(8) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder;

(9) Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations, but only if eighty-five percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses;

(10) Insurance corporations paying a premium tax under Title 22 of the Louisiana Revised Statutes of 1950;

(11) Farmers', fruitgrowers', or like associations organized and operated on a cooperative basis for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the product furnished by them, or for the purpose of purchasing supplies and equipment for the use of members or other persons and turning over such supplies and equipment to them at actual costs, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed eight per cent per annum on the value of the consideration for

which the stock was issued, and if substantially all of such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve required by state law or a reasonable reserve for any necessary purpose. Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for members, and may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the value of the purchases made for persons who are neither members nor producers does not exceed fifteen per cent of the value of all its purchases;

(12) Corporations organized by an association exempt under the provisions of paragraph (11) of this Section or members thereof, for the purpose of financing the ordinary crop operations of such members or other producers, and operated in conjunction with such association. Exemption shall not be denied any such corporation because it has capital stock, if the dividend rate of such stock is fixed at not to exceed eight per cent per annum on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate directly or indirectly, in the profits of the corporation, upon dissolution, or otherwise, beyond the fixed dividends) is owned by such association, or members thereof; nor shall exemption be denied any such corporation because there is accumulated and maintained by it a reserve required by state law or a reasonable reserve for any necessary purpose;

(13) Corporations organized for the exclusive purpose

of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to organizations which are organized and operated exclusively for religious, charitable, scientific, literary, and educational purposes, no part of the net earnings of which inures to the benefit of any private stockholder;

(14) Voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents, if no part of their net earnings inures (other than through such payments) to the benefit of any private shareholder or individual and if eighty-five per cent or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses;

(15) Teachers' retirement fund associations of a purely local character, if no part of their net earnings inures (other than through payment of retirement benefits) to the benefit of any private shareholder or individual, and if the income consists solely of amounts received from assessments upon the teaching salaries of members, and income in respect of investments.

§ 609. Accrual, payment and reporting of tax

The tax levied by this Chapter is for the annual accounting period, fiscal, or calendar year, regularly used by the taxpayer in keeping its books, with no proration for a portion of the year in the case of dissolution of domestic corporations or withdrawal from the state by foreign corporations or where a corporation otherwise ceases to become taxable under this Chapter. The tax accrues on the first day of each calendar or fiscal year and annually thereafter, and is computed on the basis of the previous calendar or fiscal year closing. The tax is payable to the collector on or before the fifteenth day of the fourth month following the month in which the tax

accrues. With its payment the taxpayer shall deliver to the collector a full, accurate and complete report and statement signed by a duly authorized official of the corporation, containing such information as the collector may require. In the year 1959 corporations presently using the fiscal year basis shall report and pay the tax levied herein for the period January 1, 1959, to the first fiscal closing date thereafter. The tax shall be based on the fiscal year closing prior to January 1, 1959, and shall be computed by multiplying the ratio that the number of months from January 1, 1959, to the fiscal closing in the year 1959 bears to twelve, times the tax as computed on the yearly basis. The tax due for the period January 1, 1959, to the first fiscal closing thereafter may be reported and paid with the next payment regularly due as provided herein. Subsequent returns shall be filed in accordance with this amendment.

If permission is granted to change the corporate accounting period as provided in R.S. 47:613, the corporation shall file a return for the period from the end of the twelve-month period for which the tax had already accrued to the first fiscal closing of the new accounting period. The tax to be paid in this case shall be based on the preceding fiscal closing and shall be computed by multiplying the ratio that the number of months from the closing date under the prior accounting period to the closing of the new accounting period bears to twelve, times the tax as computed on the yearly basis. Subsequent returns will be filed on the basis of the new accounting period in accordance with the provisions of this amendment.

§ 610. Repealed by Acts 1958, No. 437, § 1

History and Sources of Law

This section was derived from Acts 1935, 1st Ex.Sess., No. 10, § 3(1), Acts 1946, No. 201, and related to accrual and payment of tax. Subject matter is now covered by R.S. 47:609.

§ 611. Newly taxable corporation

Every corporation shall pay only the minimum tax of ten dollars ($10.00) in the first accounting period or fraction thereof in which it becomes subject to the tax levied herein. The first tax accrues immediately on the corporation's becoming taxable under this Chapter and is payable on or before the fifteenth day of the fourth month after the month in which the tax accrues. After the first closing of the corporate books the tax is payable as provided in R.S. 47:609.

§ 612. Extension of time for filing return and paying tax

The collector may grant a reasonable extension, not to exceed six months, for the filing of the report required in this Chapter if application for such extension is requested by the taxpayer prior to the time when the report is due to be filed. The effective date from which interest is to be computed will in all cases remain as is hereinafter provided.

§ 613. Fiscal year defined; accounting period not to be changed

"Fiscal year" as used in this Chapter, means an accounting period of twelve months ending on the last day of any month other than December. However, no fiscal year will be recognized, unless, before its close, it was definitely established as an accounting period by taxpayer and the books of such taxpayer were kept in accordance therewith. No accounting period shall be changed without the approval of the collector of revenue.

§ 614. Cost of collection

The cost required by the collector in the collection of the tax imposed in this Chapter shall be withheld and paid out of the first sums realized on the collection of the tax or

any penalties and interest applicable thereto, and for these purposes, the expenses of the collector shall not exceed one hundred thousand dollars ($100,000.00) per annum.

§ 615. Disposition of collections

All moneys collected from the tax, interest, and penalties provided for in this Chapter, less expenses withheld as provided in R.S. 47:614, shall be remitted to the treasurer on or before the tenth day of the month following the month in which collections are made. The treasurer shall allocate and distribute the collections as follows:

(1) The first four hundred thousand dollars of the annual collections shall be remitted directly to the Board of Administrators of the Charity Hospital of Louisiana at New Orleans. This money shall be used by the hospital for the payment of principal and interest and any required reserves therefor that may be due by the board of administrators of the hospital to the Federal Emergency Administration of Public Works or to any board, body or agency succeeding to its powers and duties or to any other federal agency, or any other purchaser or holder, on account of any bonds or other obligations issued and sold thereto or contracts entered into therewith, by the board of administrators for the objects and purposes prescribed in Section 1 of Act 166 of 1934, and subject to the provisions of Section 7 of Act 166 of 1934, as amended by Act 72 of 1936; provided, that any balance of the sum of four hundred thousand dollars after paying these bonds and the interest thereon as the same shall become due and establishing and maintaining any required reserve fund therefor, may be used by the hospital and pledged to the payment of bonds or other obligations referred to hereinafter in paragraph (2) of this Section.

(2) The second four hundred thousand dollars of the annual collections shall be remitted directly to the Board of

Administrators of the Charity Hospital of Louisiana at New Orleans. This money shall be used by the hospital for the payment of principal and interest and any required reserves therefor that may be due by the board of administrators of the hospital to the Federal Emergency Administration of Public Works or to any board, body or agency succeeding to its powers and duties or to any other federal agency, or any other purchaser or holder, on account of any bonds or other obligations issued and sold thereto or contracts entered into therewith by the board of administrators of the hospital, for the objects and purposes prescribed in Act 4 of 1938, and subject to the provisions of section 7 of that act.

(3) In addition to the amounts authorized to be remitted annually to the Charity Hospital of Louisiana at New Orleans under the provisions of Subsections (1) and (2) of this Section, the additional amount of two hundred thousand dollars of the annual collections shall be remitted directly to the Board of Administrators of the Charity Hospital of Louisiana at New Orleans. This money shall be used by the hospital, first, for the payment of outstanding bonds issued pursuant to Act 166 of the Regular Session of 1934, as amended by Act 72 of the Regular Session of 1936 and Act 4 of the Regular Session of 1938, and, second, for the payment of the principal of and interest on the bonds authorized to be issued by Act 97 of 1966 for the purposes set forth in said Act 97 of 1966 and subject to the provisions of said Act.

(4) Forty thousand dollars thereof annually to the Governor of Louisiana to be used by him for the preservation of law and order, in the enforcement of state law, in apprehending fugitives from justice, in paying rewards for the apprehension of criminals, and in paying the costs of investigations lawfully ordered, promoting the general welfare, and publicizing the state of Louisiana.

(5) After making payment of the sums above specified

there shall be remitted of the annual collection to the board of supervisors of the Louisiana State University and Agricultural and Mechanical College the following sums in the following order:

(a) The sum of three hundred fifty thousand dollars to be used to construct, furnish and equip additional buildings and to demolish, replace, remodel or enlarge any existing buildings deemed necessary or advisable by said board on the campus of the university at Baton Rouge, on the campus of the North East Center at Monroe, or on the grounds of the medical school at New Orleans.

(b) The sum of one million two hundred seventeen thousand dollars to be used by the board of supervisors of the Louisiana State University and Agricultural and Mechanical College for its endowment, maintenance and support; for constructing, furnishing and enlarging any buildings, and for repairing, remodeling or enlarging existing buildings.

(6) The remainder of the annual collections, after paying the sums specified in this Section and in R.S. 47:614 in the order set out, shall be credited to the general fund of the state and disbursed by the State Treasurer as directed by law.

§ 616. Franchise taxes by local governments prohibited

Parishes, cities and towns shall not levy a franchise tax on the corporations taxed under this Chapter.

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PART III. ASSESSMENT AND COLLECTION PROCEDURES

§ 1561. Alternative remedies for the collection of taxes

In addition to following any of the special remedies pro-

vided in the various chapters of this subtitle, the collector may, in his discretion, proceed to enforce the collection of any taxes due under this subtitle by means of any of the following alternative remedies or procedures:

(1) Assessment and distraint, as provided in R.S. 47:1562 through 47:1573.

(2) Summary court proceeding, as provided in R.S. 47:1574.

(3) Ordinary suit under the provisions of the general laws regulating actions for the enforcement of obligations.

The collector may choose which of these procedures he will pursue in each case, and the counter-remedies and delays to which the taxpayer will be entitled will be only those which are not inconsistent with the proceeding initiated by the collector, provided that in every case the taxpayer shall be entitled to proceed under R.S. 47:1576 except (a) after he has filed a petition with the board of tax appeals for a redetermination of the assessment, or (b) when an assessment for the tax in question has become final or (c) when a suit involving the same tax obligation is pending against him; and provided further, that the fact that the collector has initiated proceedings under the assessment and distraint procedure will not preclude him from thereafter proceeding by summary or ordinary court proceedings for the enforcement of the same tax obligation.

§ 1562. Determination and notice of tax due

If a taxpayer fails to make and file any return or report required by the provisions of this Sub-title, or if the return or report made and filed does not correctly compute the liability of said taxpayer, the collector shall cause an audit, investigation or examination to be made to determine the tax, penalty and interest due, or he shall determine the tax, penalty or

interest due by estimate or otherwise. Having determined the amount of tax, penalty and interest due, the collector shall send by mail a notice to the taxpayer at the address given in the last report filed by him pursuant to the provisions of the Chapter governing the tax involved, or if no report has been filed, to any address that may be obtainable, setting out his determination and informing the person of his purpose to assess the amount so determined against him after fifteen calendar days from the date of the notice.

Amended by Acts 1971, No. 58, § 1.

§ 1563. Protest to collector's determination of tax due

The taxpayer, within fifteen calendar days from the date of the notice provided in R.S. 47:1562 may protest thereto. This protest must be in writing and should fully disclose the reasons, together with facts and figures in substantiation thereof, for objecting to the collector's determination. The collector shall consider the protest, and in his discretion may grant a hearing thereon, before making a final determination of tax, penalty and interest due.

Amended by Acts 1971, No. 58, § 1.

§ 1564. Assessment of tax, interest and penalties

At the expiration of fifteen calendar days from the date of the collector's notice provided in R.S. 47:1562, or at the expiration of such time as may be necessary for the collector to consider any protest filed to such notice the collector shall proceed to assess the tax, penalty and interest that he determines to be due under the provisions of any Chapter of this Subtitle. The assessment shall be evidenced by a writing in any form suitable to the collector, which sets forth the name of the taxpayer, the amount determined to be due, the kind of

tax, and the taxable period for which it is due. This writing shall be retained as a part of the collector's official records. The assessment may confirm or modify the collector's originally proposed assessment.

Amended by Acts 1971, No. 58, § 1.

§ 1565. Notice of assessment and right to appeal

A. Having assessed the amount determined to be due, the collector shall send, by registered mail, a notice to the taxpayer against whom the assessment lies, at the address given in the last report filed by said taxpayer, or if no report has been filed to any such address as may be obtainable. This notice shall inform the taxpayer of the assessment made against him and notify him that he has thirty calendar days from the date of the notice within which either to pay the amount of the assessment or to appeal to the board of tax appeals for a redetermination of the assessment. All such appeals shall be made in the manner set out in Chapter 17, Subtitle II of this title.

B. If at the expiration of the delay of thirty calendar days the taxpayer has not filed an appeal with the board of tax appeals, then, except as provided in Subsection C of this section, the assessment shall be final and shall be collectible by distraint and sale as hereinafter provided. If an appeal to the board of tax appeals for a redetermination of the assessment has been filed, the assessment shall not be collectible by distraint and sale until such time as the assessment has been redetermined or affirmed by the board of tax appeals or the court which last reviews the matter.

C. No assessment made by the collector shall be final if it is determined that the assessment was based on an error of fact or of law. An error of fact for this purpose means facts material to the assessment assumed by the collector at the

time of the assessment to be true but which subsequently are determined by the collector to be false. Error of law for this purpose means that in making the assessment the collector applied the law contrary to the construction followed by the collector in making other assessments. The determination of an error of fact or of law under this subsection shall be solely that of the collector, and no action against the collector with respect to the determination shall be brought in any court, nor shall any appeal relating thereto be brought before the board of tax appeals, and no court shall have jurisdiction of any such appeal, it being the intent of this subsection only to permit the collector to correct manifest errors of fact or in the application of the law made by the collector in making the assessment; provided however, that all reductions of assessments based on such errors must be approved and signed by the collector of revenue, and the general counsel of the Department of Revenue, and shall then be approved by the board of tax appeals and signed by the chairman thereof. The remedies of a taxpayer aggrieved by any action of the collector are by appeal to the board of tax appeals or by payment of the disputed tax under protest and suit to recover as provided in this subtitle.

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§ 1569. Collection by distraint and sale authorized

When any taxpayer fails to pay any tax, penalty and interest assessed, as provided in this Sub-title, the collector may proceed to enforce the collection thereof by distraint and sale.

§ 1570. Distraint defined

The words "distraint" or "distrain" as used in this Subtitle, shall be construed to mean the right to levy upon and seize and sell, or the levying upon or seizing and selling, of any property or rights to property of the taxpayer including goods, chattels, effects, stocks, securities, bank accounts, evidences

of debt, wages, real estate and other forms of property, by the collector or his authorized assistants, for the purpose of satisfying any assessment of tax, penalty or interest due under the provisions of this Sub-title.

Property exempt from seizure by Articles 644 and 645 of the Louisiana Code of Practice is exempt from distraint and sale herein.

§ 1571. Distraint procedure

Whenever the collector or his authorized assistants shall distrain any property of a taxpayer, he shall cause to be made a list of the property or effects distrained, a copy of which, signed by the collector or his authorized assistants shall be sent by registered mail to the taxpayer at his last known residence or business address, or served on the taxpayer in person. This list shall be accompanied with a note of the sum demanded and a notice of the time and place where the property will be sold. Thereafter, the collector shall cause a notice to be published in the official journal of the parish wherein the distraint is made, specifying the property distrained, and the time and place of sale. The sale shall be held not less than fifteen calendar days from the date of the notice mailed or served on the taxpayer or the date of publication in the official journal, whichever is later. The collector may postpone such sale from time to time, if he deems it advisable, but not for a time to exceed thirty calendar days in all. If the sale is continued to a new date it shall be readvertised.

§ 1572. Surrender of property subject to distraint

Any person in possession of property or rights to property subject to distraint, upon which a levy has been made, shall, upon demand by the collector or his authorized assistants, making such levy, surrender such property or rights to the

collector or his authorized assistants, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process. Any person failing or refusing to surrender any such property or rights shall be liable to the state in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes, penalties, and interest and other costs and charges which are due.

§ 1573. Sale of distrained property

The collector, or his authorized assistants, shall sell at public auction for cash to the highest bidder so much of the property distrained by him as may be sufficient to satisfy the tax, penalties, interest, and costs due. He shall give to the purchaser a certificate of sale which will be prima facie evidence of the right of the collector to make the sale, and conclusive evidence of the regularity of his proceedings in making the sale, and which will transfer to the purchaser all right, title and interest of the taxpayer in and to the property sold.

Out of the proceeds of the sale, the collector shall first pay all costs of the sale and then apply so much of the balance of the proceeds as may be necessary to pay the assessment. Any balance beyond this shall be paid to the taxpayer.

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§ 1576. Payment of tax under protest; remedy at law for recovery

A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give

the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Sub-title, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

SUPREME COURT OF LOUISIANA

NO. 52115

STATE OF	:	NOS. 87,832-833-838
LOUISIANA	:	19TH JUDICIAL DISTRICT COURT
VERSUS	:	PARISH OF EAST BATON ROUGE
LEON S. POIRIER	:	STATE OF LOUISIANA

REASONS FOR JUDGMENT

The accused filed motions to quash bills of information charging him with violations of R.S. 47:1641, which reads as follows:

> Section 1641. Criminal penalty for failing to account for state tax money
>
> Any person required under this Sub-title to collect, account for, or pay over any tax, penalty, or interest imposed by this Sub-title, who wilfully fails to collect or truthfully account for or pay over such tax, penalty or interest, shall in addition to other penalties provided by law, be guilty of a felony and shall be fined not more than ten thousand dollars ($10,000.00) or imprisoned for not more than five years, or both.

In answer to questions in bills of particulars, the state admits that the accused did not collect or withhold the taxes which he is charged with not paying from some other person and that he is only accused of not paying his own income tax.

It is the opinion of this Court that R.S. 47:1641 must be considered in its entirety, including its title, and in conjunction with R.S. 47:1642, which reads as follows:

> Section 1642. Criminal penalty for evasion of tax
>
> Any person who wilfully fails to file any return or report required to be filed by the provisions of this Sub-

title, or who wilfully files or causes to be filed, with the collector, any false or fraudulent return, report or statement, or who wilfully aids or abets another in the filing with the collector of any false or fraudulent return, report of statement, with the intent to defraud the state or evade the payment of any tax, fee, penalty or interest, or any part thereof, which shall be due pursuant to the provisions of this Sub-title, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned for not more than one year, or both.

Section 1641 clearly contemplates the more serious offense which would result if a person who has a statutory duty to collect or withhold taxes from some other person does so and then fails to account for or pay over the taxes to the State.

Section 1642 applies to a situation where a taxpayer attempts to evade payment of his own taxes by failing to file a return or by filing a false or fraudulent return, and this section carries a lesser penalty than Section 1641. To construe R.S. 47:1641 in the manner in which the state argues would make it a more serious crime to simply fail to pay one's own taxes than to file a false and fraudulent return.

Both of these penalty provisions were apparently taken from Federal statutes, and R.S. 47:1641 is identical to 26 USCA 7202 except for the word "or" being substituted in Section 1641 for "and" in the Federal statute.

The explanation of 26 USCA 7202 contained in the 1954 U. S. Code Congressional and Administrative News at page 5251 is as follows:

Section 7202. Willful failure to collect or pay over tax

This section is identical with that of the House bill.

This section provides that, in the case of any tax imposed by this title **which any person must collect and pay over to the United States**, it is a felony punishable by a fine of not more than $10,000, or imprisonment for not more than 5 years, or both, willfully to fail to collect or truthfully account for and pay over such tax. This

provision corresponds to numerous sections of existing law which cover this offense. (Emphasis supplied)

It is the opinion of this Court that the intent of the state statute and the Federal statute were and are the same despite the use of the conjunction "or" in the state statute. To hold otherwise would subject to prosecution any person who failed to pay his own tax for whatever reason, financial inability or otherwise, so long as the failure to pay was willful. To hold that any person required by law to pay any tax, who wilfully fails to pay such tax, is guilty of a felony under R.S. 47:1641 would construe that statute to embrace many acts which could not be criminal in nature. The words "to collect," "account for" and "pay over" contained in Section 1641, in the Court's opinion, clearly imply more than merely failing to pay one's own individual income tax in full.

The conduct of which the defendant is accused is prohibited by R.S. 47:1642 and he was improperly billed under R.S. 47:1641 which was intended to apply to cases where a person collects taxes as the statutory agent of the state and then fails to pay them over.

The motions to quash are sustained.

Baton Rouge, Louisiana, this 31st day of January, 1972.

s/ DONOVAN W. PARKER, Judge

Filed January 31, 1972

s/ _____, Deputy Clerk

A TRUE COPY
Clerk's Office
Parish of East Baton Rouge
Baton Rouge, Louisiana
August 28, 1974

s/ Brenda Lively, Deputy Clerk

SUPREME COURT OF LOUISIANA

New Orleans, 70112

87832—838

STATE OF LOUISIANA February 3, 1972

V.

LEON S. POIRIER NO. 52,115

In re: State of Louisiana applying for writs of certiorari, prohibition and mandamus.

Writ refused. The ruling complained of is correct.

/s/ EHMcC
/s/ WBH
/s/ JWS
/s/ FWS
/s/ MEB
/s/ AT Jr.
/s/ JAD

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
February 3, 1972

s/ _____, Deputy Clerk

SUPREME COURT OF LOUISIANA

New Orleans 70112

87832—838

STATE OF LOUISIANA January 25, 1972

V.

LEON S. POIRIER NO. 52,088

In re: State of Louisiana applying for writs of certiorari, prohibition and mandamus.

Application denied; the ruling of the trial judge is correct.

/s/ JAD
/s/ EHMcC
/s/ WBH
/s/ JWS
/s/ FWS
/s/ MEB
/s/ AT Jr.

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Clerk's Office
Supreme Court of Louisiana
New Orleans
January 25, 1972

s/ ————————, Deputy Clerk